

Alliance for the Great Lakes * American Rivers * Appalachian Trail Conservancy
Clean Water Action * Environmental Law & Policy Center * League of Conservation Voters
National Wildlife Federation * Natural Resources Defense Council
Waterkeeper Alliance

May 24, 2019

Anna Wildeman, Deputy Assistant Administrator
Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, NW
Washington, DC 20460

Submitted via www.regulations.gov

Attn: Docket No.: EPA-HQ-OW-2018-0855

Re: Administrative docket for pre-proposal recommendations on the forthcoming Clean Water Act Section 401 Water Quality Certification rulemaking

Dear Assistant Administrator Wildeman:

On behalf of the undersigned conservation and environmental groups, representing millions of members and supporters across the nation, we submit the following comments on the Environmental Protection Agency's (EPA) Administrative docket for pre-proposal recommendations on the forthcoming Clean Water Act Section 401 Water Quality Certification rulemaking, Docket No. EPA-HQ-OW-2018-0855. As organizations with extensive experience working with the EPA, states, and tribes under the Clean Water Act to protect water quality and important aquatic habitats from pollution, degradation, and destruction, we are extremely concerned about the nature of possible changes to the rules governing state and tribal Clean Water Act (CWA) Section 401 water quality certification and do not believe a rulemaking is necessary and opposes any regulatory changes that restrict states' or tribes' abilities to protect their water resources.

Clean Water Act Section 401 water quality certification is one of the most important and effective tools available to states and tribes to protect the water quality of waterbodies that people rely on for drinking water and recreation, and that wildlife rely on for habitat. Section 401 is a cornerstone of the federal structure envisioned by the Clean Water Act. It provides a framework for states and tribes to work cooperatively with the federal government to ensure that their aquatic resources are protected from potential impacts related to federally issued permits and licenses.

History shows that Section 401 certification works and is not in need of fixing. We do not believe there are compelling reasons to change the regulations governing state and tribal water quality certification. To the extent a rulemaking proceeds, it is critical that such rulemaking: not change the scope of water quality review for 401 certifications; not restrict the type of conditions

that states and tribes may reasonably include in granting certification; and ensure states and tribes have adequate time to review and process complex applications once a state or tribe determines an application is complete.

This proposed rulemaking stems from President Trump's April 10, 2019 Executive Order 13868, entitled "Executive Order on Promoting Energy Infrastructure and Economic Growth," which seeks to remove important environmental safeguards for oil and gas pipelines. The order instructs the EPA to take steps in conjunction with other agencies that will make it far more difficult for states to protect waters and aquatic habitat within their borders from pollution and degradation.

In particular, the order asks the EPA to craft and implement guidance and a rule within 13 months. The order implies this rule is likely to limit the time and information that states will have to review pipeline projects to ensure they meet the water quality standards of state lakes, rivers, streams, and other important waters. The president's order also asks EPA to examine limiting the scope of projects that states and tribes can review and the conditions that states and tribes can impose on projects in order to protect their waters.

Under current law and guidance, states have been given up to a year after the state has all the information it needs to fully understand the impacts of a project on its waters, to assess whether or not a project will comply with state water quality standards. We fear that changes in guidance and this rulemaking could leave states and tribes limited to as few as 60 days from the date the application for a permit was submitted to make this determination regardless of whether or not the application contains the information that the state needs to assess the project's impacts. In a worst case scenario, these time constraints could result in decisions that cause unacceptable harm to communities and aquatic resources, or could result in an increased number of projects being denied and resulting litigation.

Most certifications get processed quickly. However, especially for complex projects, in order for states to adequately protect their waters, wildlife, and communities, states and tribes need adequate time and information to assess the effects of large and complex projects through the current state water quality certification process. This proposed rulemaking should do nothing to quell state and tribal voices and undermine their ability to restrict the time and information states and tribes need to protect their own waters that support drinking water, fish and wildlife habitat, recreation, and local economies. Likewise, states and tribes need to have flexibility to impose conditions that will protect water quality, especially given the differences in the types of resources and water quality standards between states.

Furthermore, the rule should do nothing to restrict projects subject to review. The law clearly sets forth that all federal permits or licenses that may result in a discharge in waters of the U.S. require certification. That includes permits under Sections 402 and 404 of the Clean Water Act, permits under Section 10 of the Rivers and Harbors Act, FERC licenses and applications, Department of Energy pipeline permits, and the like. Any attempt to restrict the projects subject to Section 401 certification would likely be contrary to the plain language of the Clean Water Act.

We urge EPA to drop plans for this rulemaking. If EPA proceeds, we reiterate that such rulemaking not change the scope of water quality review for 401 certifications; not restrict the type of conditions that states and tribes may reasonably include in granting certification; and ensure states and tribes have adequate time to review and process complex applications once that state or tribe determines the application is complete. We could potentially support limited changes that promote better pre-application coordination and sharing of information, and create clearer upfront expectations for applicants about the type of information that should be provided to enable states and tribes to review and process certifications.

Sincerely,

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